Supreme Court, U.S.
FILED
JUL 6 2001
OFFICE OF THE CLERK

No. 00-1737

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and WELLSVILLE, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC.,

Petitioners,

v.

VILLAGE OF STRATTON, OHIO, and JOHN M. ABDALLA, Mayor of the Village of Stratton, Ohio, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

PAUL D. POLIDORO
Counsel of Record
PHILIP BRUMLEY
RICHARD MOAKE
DONALD T. RIDLEY
Attorneys for Petitioners
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000

167994

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's statement pursuant to Rule 29.6 was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I. By failing to address the split among the circuit courts of appeals concerning the applicability of *Employment Division v. Smith* to cases involving the free exercise of religion in conjunction with freedom of speech and freedom of press, Respondents fail to respond to the primary question presented for review.

Respondents conspicuously fail to address the fact that the circuit courts of appeals have split on the level of scrutiny *Employment Division v. Smith*, 494 U.S. 872 (1990) requires for cases involving multiple First Amendment freedoms. Most circuits have construed *Smith* to require strict scrutiny in such cases. Only the Sixth Circuit Court of Appeals has construed *Smith* to require merely intermediate scrutiny for such cases. Respondents' silence on the primary question presented for review underscores the necessity of this Court granting the writ of certiorari.

II. Contrary to Respondents' assertion, Petitioners argued below that the Ordinance is overbroad because it prohibits door-to-door political speech, which includes anonymous political discourse, without a permit.

Respondents' contention that the second question presented for review was "not previously briefed nor argued before" the Sixth Circuit (Br. Opp. ii) is not accurate. The Sixth Circuit's discussion of Petitioners' argument under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), was not brought before this Court as if it were Athena springing fully armed from Zeus' forehead. It was the result of Petitioners' bringing the issue before the Sixth Circuit and that court deciding that *McIntyre* was inapplicable to this case. As the Sixth Circuit said:

> Plaintiffs argue the ordinance is unconstitutionally overbroad because it would have the effect of prohibiting individuals from going door-to-door to

> engage in political speech without first obtaining a permit. An effect, they allege, the Supreme Court effectively made unconstitutional in McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), by invalidating an Ohio statute that prohibited the distribution of anonymous campaign literature. Because requiring individuals engaging in political speech to register before going door-to-door would effectively prevent them from remaining anonymous, they conclude, the ordinance is unconstitutional. They are mistaken.

Watchtower v. Stratton, 240 F.3d 553, 563 (6th Cir. 2001) (App. A, 15a). Since the Sixth Circuit obviously addressed this issue, it is properly presented to this Court for review.

III. Respondents' assertion, that Petitioners are "solicitors" of funds, is contrary to both the district court's finding that Jehovah's Witnesses are "canvassers" under the Village Ordinance and the uncontroverted trial court record.

In an attempt to shield themselves behind cases dealing with solicitation of money, Respondents suggest that this case involves "fraudulent solicitation" by "a stranger" who wants to "publicly solicit funds." (Br. Opp. i). Respondents insinuate the solicitation of money into this case so as to bootstrap themselves to an argument under such cases. (Br. Opp. i, 5). Respondents' assertion fails for two reasons.

First, the district court specifically found that:

> Ordinance No. 1998-5 does apply to plaintiffs because Jehovah's Witnesses are "canvassers" who visit homes in neighborhoods for the purpose of "explaining" their "cause," the Gospel of Jehovah.

61 F. Supp. 2d 734, 737 (S.D. Ohio 1999), (App. B, 39a-40a). The district court did not find that Jehovah's Witnesses were

"solicitors," which, along with "canvassers," was a category of persons described in section 116.03(a) of the Ordinance. (App. E, 60a). While Petitioners disagree that the activities of Jehovah's Witnesses place them within any category of persons described in the Ordinance, the district court's characterization of them was not changed by the court of appeals.

Second, it is uncontroverted in the record that money was not solicited by Jehovah's Witnesses in the Village. (TR 73-75). That Jehovah's Witnesses accept voluntary donations was discussed by one of Petitioners' witnesses:

> Q: Mr. Ciranko, what is the cost for the Bible-based literature that is left with a householder?
>
> A: There is no charge for our literature. We leave all of our literature free of charge.
>
> Q: How is this work financed?
>
> A: It is funded by Jehovah's Witnesses themselves, by our own members. Our organization is unique in that we do not tithe. We do not pass a collection plate. We do not impose duns or dues upon our members. We do not send out letters of solicitation. We do not solicit for money from house to house.
>
> We have contribution boxes set up at our kingdom halls, and anyone who wishes can put a donation there. No one knows what each one is donating; and if one cannot afford to donate, that's fine. It's done as a free will offering.
>
> Q: What provision would there then be for a householder, someone who is met in the public ministry, to donate to this work?

> A: Well, if an individual has an interest in doing that, we feel that it's appropriate to advise them that they can certainly make a donation to Jehovah's Witnesses for our worldwide work. However, that's not the purpose in going from house to house. Our purpose in going from house to house is to talk about the Bible, to offer a study of the Bible with people. Money is the least of our interests.
>
> Q: What then is the cost for the home Bible study?
>
> A: That is free as well. Our entire organization is of a charitable, nonprofit, tax-exempt nature.

(TR 21-22). Even though some people may spontaneously offer contributions toward Jehovah's Witnesses' ministry, all of the Witnesses who engaged in door-to-door activity in the Village had been instructed not to mention, and did not mention, donations. (TR 60, 73-75).

This case is not about religious solicitation—it is about religious communication, an activity this Court has recognized as protected by the First Amendment's Free Speech and Free Exercise Clauses for over six decades. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *see also Good News Club v. Milford Central School*, __ U.S. __, 69 U.S.L.W. 4451, 4458 (2001) (Scalia, J., concurring). The First Amendment ramifications of this case are far-reaching:

- Does a resident need a permit to go from door to door to speak with his neighbors about religion, politics, sports, school budgets, etc.?
- May a parent looking for a missing child — or a child looking for a lost puppy — go door to door in the neighborhood without first obtaining the government's permission?

- May the state prevent the publisher of religious, political, or "cause"-based literature from distributing such literature from door to door free of charge without first obtaining permission from the state?

Rather than enact an ordinance that is narrowly drawn to target specific conduct, the Village chose to also regulate pure speech and pure press activities. Whether it can constitutionally do so, in this context, is an issue this Court should resolve.

IV. Respondents' argument confirms that Petitioners have presented important issues regarding the power of a municipality to regulate pure religious speech and press activity.

In an attempt to justify the constitutional validity of the Ordinance, Respondents' Brief in Opposition demonstrates the significance of the questions presented for review. To what extent may the state use its police power to regulate pure religious speech and press activity? What is the level of deference to be accorded to such an exercise of that power? What burden is there upon the state to justify such action by real evidence as opposed to speculative or conjectural?

Respondents have made the decision that no one may call at the home of any resident unless the prospective caller has first received the Village's permission to do so. Respondents then take the position that the standard of scrutiny this Court has applied in cases dealing with government-owned property should govern a review of that decision:

> [T]he ordinance in question need not be the most restrictive means available, nor must it be the most effective, most reasonable, or most obvious choice, it need only be reasonable. *Kokinda*, 497 U.S. at 735-736.

(Br. Opp. at 7).

This Court has neither permitted the state to usurp a private homeowner's rights in such a fashion, nor has this Court ever held that the proper standard for judicial review of such laws is "reasonableness." Yet, it is this standard that the Village urges.

If Respondents were correct, then their approach to this matter could conceivably be justified — their regulation of pure religious and political speech; their ignoring the animus expressed by the Mayor towards Jehovah's Witnesses; their failure to address the lack of legislative history supporting the Ordinance; their "after the fact" reliance on expert testimony of Ms. MacMurray, who rendered her opinion at trial rather than at a legislative hearing prior to passage of the Ordinance; and their continued focus on a section of the Ordinance (posting of 'No Solicitation' signs), which has never been contested in this litigation.[1]

Most disturbing is Respondents' portrayal of their interaction with Jehovah's Witnesses in an attempt to justify their regulation of pure religious speech. First, they reference the testimony of a young woman they refer to as "a lay minister" (Br. Opp. i) to suggest that the decades-long stance of Jehovah's Witnesses' not obtaining municipal permission to engage in their door-to-door ministry is somehow not sincere, truthful, or a deeply held religious belief. That was never in question in the courts below and has not been raised in any case in this country. The testimony of the Watchtower representative clearly established the religious basis for Jehovah's Witnesses' objection to obtaining municipal permission to engage in their public ministry. (TR 27).

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1. "[T]he provision of a method by which residents may indicate that solicitors, even with permits, are unwelcome, such as set forth in Section 116.07 **is not challenged in this action**." R22, Plaintiffs' Reply Memorandum to the Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction (emphasis in original), docketed 7/21/99.

In addition, Respondents state that Petitioners are attempting "to color the relationship between Jehovah's Witnesses and the Village." (Br. Opp. 3). The record eloquently portrays how Respondents view Jehovah's Witnesses:

> He [Mayor Abdalla] at that point told me that the ones that had moved into Stratton had moved in there under the understanding that they would not be bothered by Jehovah's Witnesses. And even after that point he said that if we were men, he would have taken us and put us in jail. And through this whole situation he was shaking and pointing his finger at us, and he was very upset.

(TR 77).

Nothing in the Village's opposition suggests that the issues presented are not significant. Nothing in its argument establishes that the questions presented for review are not properly before this Court. Nothing it posited, therefore, should deter the granting of the writ of certiorari.

CONCLUSION

Only by this Court's granting the writ of certiorari can the uncertainty and confusion over the meaning in *Employment Division v. Smith* be settled. Only this Court can make clear what the level of the First Amendment's protection of the communication of religious beliefs and press activity is.

James Madison wrote that "it is proper to take alarm at the first experiment on our liberties." *Memorial and Remonstrance Against Religious Assessments*, quoted in *Everson v. Bd. of Education*, 330 U.S. 1, 65 (1947). The liberty to engage in door-to-door noncommercial religious and political speech and free distribution of literature without the permission of the state has been eliminated by the Sixth Circuit's decision. The writ of certiorari should be granted.

Respectfully submitted,

PAUL D. POLIDORO
Counsel of Record
PHILIP BRUMLEY
RICHARD MOAKE
DONALD T. RIDLEY
Attorneys for Petitioners
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000